Supreme Court
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No. 80-1507

In the Supreme Court of the United States

October Term, 1980

THE CITY OF PARMA, OHIO, *et al.*, and
THE CITY OF LAKEWOOD, OHIO, *et al.*,
Appellants,

vs.

RECORD REVOLUTION NO. 6, INC. and ALEXANDER J. LUKA d/b/a DAYSTAR BOUTIQUE,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED BY THE APPEAL

1. Whether the fact that the municipal ordinances adopted by the City of Parma and the City of Lakewood (the "Ordinances") are rendered invalid under the Ohio Constitution because they conflict with Section 2925.14 of the Ohio Revised Code merits the dismissal of the appeal.

2. Whether the correct decision of the Court of Appeals for the Sixth Circuit holding that the definition of "drug paraphernalia" in the Ordinances is vague and overbroad and invites discriminatory enforcement in violation of the Due Process Clause of the Constitution merits review by this Court.

3. Whether the correct finding of the Court of Appeals for the Sixth Circuit that the Ordinances improperly create permissive inferences or permissive presumptions merits review by this Court.

4. Whether the correct decision of the Court of Appeals for the Sixth Circuit holding that the prohibition on advertising in the Ordinances impermissibly penalizes speech protected by the First Amendment to the Constitution merits review by this Court.

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No. 80-1507

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MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Appellants herein are the cities of Parma, Ohio and Lakewood, Ohio and their respective officials (hereinafter collectively referred to as the "Cities"). Appellees (hereinafter collectively referred to as the "Merchants") operate retail establishments which display, sell and advertise recorded and taped music, magazines, jewelry, T-shirts and a variety of novelty items. The Cities challenge the unanimous decision of the Court of Appeals for the Sixth Circuit ("Sixth Circuit") which declared unconstitutional and enjoined the enforcement of municipal ordinances of the cities

of Parma and Lakewood (the "Ordinances")[1] which were intended to drive the Merchants out of business.[2]

The Ordinances prohibit the possession,[3] sale,[4] manufacture,[5] and advertisement[6] of "drug paraphernalia." "Drug paraphernalia" is defined as any item "used, intended for use, or designed for use" in drug-related activities.[7] Listed in the Ordinances are legislatively designated examples of "drug paraphernalia"[8] and factors which law enforcement officers, judges and juries are instructed to consider in determining whether particular items are illicit "drug paraphernalia."[9]

The Ordinances impose criminal[10] and forfeiture[11] penalties for the possession, sale, manufacture or advertisement

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1. The Sixth Circuit also unanimously held unconstitutional a similar ordinance adopted by the City of North Olmsted, Ohio. The City of North Olmsted has determined not to appeal the decision of the Sixth Circuit.

The Ordinances are included in the Appendix to the Cities' Jurisdictional Statement ("Jurisdictional Statement"), beginning at p. A119.

2. *Record Revolution No. 6, Inc. v. City of Parma*, No. 80-3308, slip op. at 13-14 (6th Cir. Dec. 8, 1980) (hereinafter cited as "Slip Op.").

3. Parma Ordinance §§ 620.04(a) & (b); Lakewood Ordinance §§ 513.04(a) & (b).

4. Parma Ordinance § 620.04(b); Lakewood Ordinance § 513.04(b).

5. Parma Ordinance § 620.04(b); Lakewood Ordinance § 513.04(b).

6. Parma Ordinance § 620.04(c); Lakewood Ordinance § 513.04(c).

7. Parma Ordinance § 620.01(dd)(1); Lakewood Ordinance § 513.01(cc)(1).

8. Parma Ordinance § 620.01(dd)(1)(L); Lakewood Ordinance § 513.01(cc)(1)(L).

9. Parma Ordinance §§ 620.01(dd)(2)(A)-(N); Lakewood Ordinance §§ 513.01(cc)(2)(A)-(M), as amended.

10. Parma Ordinance § 620.04(h); Lakewood Ordinance § 513.04(h), as amended.

11. Parma Ordinance § 620.04(f); Lakewood Ordinance § 513.04(f), as amended.

of so-called "drug paraphernalia." An individual violating the Ordinances for the first time is subject to a jail sentence of up to Ninety (90) days or a fine of up to Seven Hundred Fifty Dollars ($750.00) or both. If a person delivers "drug paraphernalia" to a juvenile, that person is subject to a jail sentence of up to Six (6) months or a fine of up to One Thousand Dollars ($1,000.00) or both.

Following a full evidentiary hearing, the United States District Court for the Northern District of Ohio ("District Court") found central portions of the Ordinances in violation of the Constitution.[12] However, rather than strike down the Ordinances, the District Court substantially rewrote the Ordinances by "adding to, deleting from and defining the statutory language."[13]

The Sixth Circuit unanimously reversed the judgment of the District Court, declared the Ordinances unconstitutional, and remanded for issuance of a permanent injunction. The Sixth Circuit correctly held:

(1) The District Court exceeded the scope of its powers by substantially rewriting the Ordinances;

(2) The Ordinances are vague and overbroad, invite discriminatory enforcement, and improperly create permissive inferences in violation of the Due Process Clause of the Constitution; and

(3) The Ordinances impermissibly penalize speech protected by the First Amendment to the Constitution.

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12. *Record Revolution No. 6, Inc. v. City of Parma, Ohio*, 492 F. Supp. 1157 (N.D. Ohio 1980).

13. Slip Op. at 17.

MOTION TO DISMISS

The Ordinances violate the Ohio Constitution because they conflict with a statute recently enacted[14] by the Ohio General Assembly which prohibits the sale of "drug paraphernalia" to juveniles. Therefore, it is unnecessary for this Court to reach any of the federal questions raised by the appeal and, accordingly, the appeal should be dismissed.

Municipalities in Ohio have the authority to exercise such powers, and to enact and enforce such local legislation, as do not conflict with statutes and laws passed by the state legislature which are of general application throughout the State. This limitation on the powers which a municipality lawfully possesses derives from the Ohio Constitution:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*

Ohio Const., Art. XVIII, § 3 (emphasis supplied).

In determining whether an ordinance is "in conflict with general laws,"[15] the Ohio Supreme Court has held that "the test is whether the [municipal] ordinance permits or licenses that which the [state] statute forbids

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14. Section 2925.14 of the Ohio Revised Code, enacted on December 19, 1980, eleven days after the opinion of the Sixth Circuit was filed, became effective March 23, 1981.

15. Section 2925.14 of the Ohio Revised Code is a "general law" within the meaning of Article XVIII, § 3. *Cf. State ex rel. Arey v. Sherrill,* 142 Ohio St. 574, 53 N.E.2d 501 (1944) (paragraph 2 of the syllabus) ("The words 'general laws,' as used in the phrase 'not in conflict with general laws' in Section 3, Article XVIII of the Constitution, refer to laws enacted by the General Assembly.").

and prohibits, *and vice versa.*" *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923) (paragraph 2 of the syllabus) (emphasis added).

The Ordinances clearly conflict with Section 2925.14 of the Ohio Revised Code (the "State Statute")[16] because they forbid and prohibit conduct which the State Statute specifically permits.

The State Statute makes it a criminal offense for a person to sell or offer to sell "drug paraphernalia" to a juvenile,[17] and provides to a defendant three affirmative defenses.[18] The penalty for a violation of the State Statute is a maximum jail sentence of up to Six (6) months or a fine of up to One Thousand Dollars ($1000.00) or both.[19]

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16. Section 2925.14 of the Ohio Revised Code is set forth in the Appendix.

17. Section 2925.14(B) of the Ohio Revised Code. "Juvenile" is defined as "a person under eighteen years of age." Section 2925.01(O) of the Ohio Revised Code (amended effective March 23, 1981).

18. Section 2925.14(C) of the Ohio Revised Code. The affirmative defenses are:

> (1) The defendant is the parent, guardian, or custodian of the juvenile involved.
>
> (2) The juvenile involved, at the time the paraphernalia for the use of marihuana was sold or offered for sale to him, was accompanied by his parent, guardian, or custodian who, with knowledge that the paraphernalia sold or offered for sale would be used or was intended for use for a purpose set forth in division (A)(1), (2), (3), or (4) of this section, consented to the paraphernalia for the use of marihuana being sold or offered for sale to the juvenile.
>
> (3) The juvenile involved exhibited to the defendant or his agent or employee a draft card, driver's license, birth certificate, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or older, and the person to whom the document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under eighteen years of age.

19. *See* Section 2925.14(E) of the Ohio Revised Code.

The Ordinances also proscribe the sale or the offer to sell "drug paraphernalia" to juveniles,[20] providing the same criminal penalties for said activities as provided by the State Statute.[21] However, the Ordinances fail to provide the affirmative defenses to a violation that are provided in the State Statute. Thus, for instance, the Ordinances prohibit the sale of "drug paraphernalia" to a juvenile accompanied by his consenting parent while the State Statute positively permits such conduct by its inclusion of an affirmative defense which provides that such sale is lawful.

For these reasons, the Ordinances are in direct conflict with the State Statute.[22] The Ordinances have been rendered invalid by the subsequent State Statute, and their continued existence violates the Ohio Constitution. Therefore, it is unnecessary for this Court to reach any of the federal issues raised by the Cities and, accordingly, the appeal should be dismissed.

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20. Parma Ordinance §§ 620.04(b) and (d); Lakewood Ordinance §§ 513.04(b) and (d), as amended.

21. Parma Ordinance § 620.04(h); Lakewood Ordinance § 513.04(h), as amended. However, the Ordinances provide forfeiture penalties not provided by the State Statute. *See* Parma Ordinance § 620.04(f); Lakewood Ordinance § 513.04(f), as amended.

22. *See City of Cleveland v. Raffa*, 13 Ohio St. 2d 112, 235 N.E.2d 138, *cert. denied*, 393 U.S. 927 (1968); *Neil House Hotel Co. v. City of Columbus*, 144 Ohio St. 248, 58 N.E.2d 665 (1944); *State ex rel. Cozart v. Carran*, 133 Ohio St. 50, 11 N.E.2d 245 (1937); *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929); *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923).

MOTION TO AFFIRM

Alternatively, the Merchants move to affirm the judgment of the Sixth Circuit on the grounds that the questions presented are so unsubstantial as not to warrant further argument. Any decision by this Court would be premature and would have an extremely limited impact. Moreover, the judgment of the Sixth Circuit is plainly correct.

A. Any Decision by this Court Would Be Premature and Would Have an Extremely Limited Impact.

This appeal does not present to the Court questions concerning the constitutionality of a federal law, with nationwide implications, adopted by the Congress of the United States. Although the "drug paraphernalia" ordinances adopted in Parma and Lakewood are based upon a Model Drug Paraphernalia Act ("Model Act") drafted by the Drug Enforcement Agency of the Department of Justice, the Justice Department apparently determined not to submit the draft of its Model Act to Congress for consideration.[23] While some governmental units have adopted laws based, in whole or in part, on the Model Act, other governmental units that have considered the "drug paraphernalia" issue have determined not to adopt any law or adopted one of a number of formulations substantially differing from the Model Act. This case only raises questions concerning ordinances adopted by two municipalities

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23. If, as suggested by the Cities at page 8 of their Jurisdictional Statement, the sale of "drug paraphernalia" creates a major national problem, it is surprising that the Justice Department did not submit its Model Act to Congress. Moreover, there is nothing in the record to support the Cities' allusion to a multimillion dollar industry which preys upon the nation's youth. Jurisdictional Statement at 8.

in the State of Ohio, for the Ordinances materially differ from the Model Act.[24]

The vast majority of courts presented with the issue of the constitutionality of laws banning the sale and possession of "drug paraphernalia" have declared those laws unconstitutionally vague and overbroad and has enjoined enforcement thereof. *E.g., The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates,* No. 80-1462 (7th Cir. Jan. 14, 1981) (citing the judgment of the Sixth Circuit with approval); *General Stores, Inc. v. City of Albuquerque,* No. 81-0027-M (D.N.M. March 23, 1981); *The Town Tobacconist v. Degnan,* No. C-2198-80 (Super. Ct. Ch. N.J. March 12, 1981); *Gaffey v. Babb,* No. CA-13882 (Ct. App. Or. Feb. 23, 1981); *Weiler v. Carpenter,* No. 80-637-JB (D. N.M. Feb. 11, 1981); *Lazy, J., Ltd. v. The Borough of State College,* No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville,* No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981); *High Ol' Times, Inc. v. Busbee,* No. 78-628A (N.D. Ga. Dec. 1, 1980); *Record Head Corp. v. Sachen,* No. 80-C-639 (E.D. Wis. Sept. 30, 1980); *Magnani v. City of Ames,* No. 80-229-A (S.D. Iowa July 21, 1980); *Hejira Corp. v. J.D. MacFarlane,* No. 80-F-824 (D. Colo. Sept. 15, 1980); *Music Stop, Inc. v. City of Ferndale,* 488 F. Supp. 390 (E.D. Mich. 1980); *Indiana Chapter, NORML, Inc. v. Sendak,* No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) (3-judge district court), *vacated as moot at the time of appeal,* No. 80-1305 (7th Cir. July 22, 1980); *Knoedler v. Roxbury Township,* No. 80-228 (D.N.J. Jan. 31, 1980); *Weingart v. Town of Oyster Bay,* No. 79-C-2932 (E.D.N.Y. Dec. 17, 1979); *Record Museum v. Lawrence Township,* 481 F. Supp 768 (D.N.J. 1979); *Bambu Sales, Inc. v. Gibson,* 474 F. Supp. 1297 (D.

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24. The most important differences are that the "reasonably should have known" criterion, found throughout the Model Act, has been eliminated in almost all provisions of the Ordinances, and the factor referring to a "legitimate supplier" in the Model Act is not in the Ordinances.

N.J. 1979); *Riddle v. Clack,* No. 3-77-0525-D (N.D. Tex. Aug. 25, 1977).

Significantly, contrary to the statement of the Cities at page 9 of their Jurisdictional Statement, since the Sixth Circuit rendered its well-reasoned judgment, *every* court presented with a challenge to a "drug paraphernalia" law based upon the Model Act has followed the lead set by the Sixth Circuit in striking down the law. *E.g., General Stores, Inc. v. City of Albuquerque,* No. 81-0027-M (D.N.M. March 23, 1981); *Weiler v. Carpenter,* No. 80-637-JB (D. N.M. Feb. 11, 1981); *Lazy, J., Ltd., v. The Borough of State College,* No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville,* No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981); *Gaffey v. Babb,* No. CA-13882 (Ct. App. Or. Feb. 23, 1981); *The Town Tobacconist v. Degnan,* No. C-2198-80 (Super. Ct. Ch. N.J. March 12, 1981).

The Court of Appeals for the Sixth Circuit is the only federal appellate court to have decided cases presenting the issue of the constitutionality of any "drug paraphernalia" laws based upon the Model Act. Moreover, only a handful of federal district courts have dealt with that same issue. It is premature for this Court to consider the instant appeal, particularly in light of the unanimous determination of courts following the judgment of the Sixth Circuit that ordinances and statutes based upon the Model Act violate the First and Fourteenth Amendments to the Constitution.

B. The Sixth Circuit Correctly Held that the District Court Exceeded the Scope of its Powers by Substantially Rewriting the Ordinances.

The Sixth Circuit correctly held that the District Court usurped the legislative function by substantially revising the Ordinances in an attempt to remedy the constitutional defects it found in the Ordinances:

> The district court construed the drug paraphernalia ordinances by adding to, deleting from and defining the statutory language. A federal court, however, has very limited powers in construing state statutes or municipal ordinances. For the federal court's interpretation of state or municipal legislation is "not binding on the state courts and may be discredited at any time—thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless." *Moore v. Sims,* 442 U.S. at 428. *See State v. Young,* 62 Ohio St. 2d at 375 n.2, 406 N.E.2d at 503 (After citing to a federal court decision on the same state statute, the Ohio Supreme Court declared: This federal case is not binding upon this court, and we note the decision rendered in that case only as supporting authority).

Slip Op. at 17-18. *See also Hynes v. Borough of Oradell,* 425 U.S. 610, 622 (1976); *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971). Based upon these principles, the Sixth Circuit properly held that the District Court exceeded the scope of its powers. "The district court should have declared the ordinances unconstitutionally vague and overbroad on the basis of the defects that it found in the ordinances." Slip Op. at 19.

The Cities, relying upon *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), argue that federal courts have the same power authoritatively to construe state statutes and municipal ordinances as to construe federal legislation.[25] Jurisdictional Statement at 13-14. However, the Cities'

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25. Each of the other cases relied upon by the Cities, Jurisdictional Brief at 13, involve federal courts interpreting federal legislation, and are therefore inapposite. *E.g., Califano v. Yamasaki,* 442 U.S. 682 (1979); *United States v. National Dairy Products Corp.,* 372 U.S. 29, 32 (1963); *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379 (1933); *United States v. Kiffer,* 477 F.2d 349 (2d Cir.), *cert. denied,* 414 U.S. 831 (1973).

lengthy quote from *Erznoznik*, 422 U.S. at 216, at page 14 of their Jurisdictional Brief, is misleading. The Cities replaced several crucial words with an ellipsis at the end of the quoted portion as follows:

> [W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction *by the state courts* . . . .

The underlined words were omitted by the Cities from the quotation, thereby changing the entire meaning of the Court's analysis. *Erznoznik* does not support the proposition that federal courts have the same power to construe federal and state laws.[26] For the reasons discussed by the Sixth Circuit, federal courts have very limited powers to construe state statutes or local ordinances.

The Sixth Circuit properly refused to condone the rewriting of municipal ordinances by a federal court.[27] For

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26. The Cities also rely on *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), for the proposition that a federal court should "extrapolate" the meaning of a state or municipal law so as to uphold its constitutionality. Jurisdictional Brief at 14. However, the Court in *Grayned* distinguished between "extrapolation" and "construction":

> "Extrapolation," of course, is a delicate task, for it is not within our power to *construe* and *narrow* state laws.

408 U.S. at 110 (emphasis added). The Court in *Grayned* did not add, delete or narrow any statutory terms, as opposed to the actions taken by the District Court herein. Slip Op. at 18 n.12.

27. Moreover, the Sixth Circuit correctly stated that the state courts could not construe the Ordinances so as to eliminate the problems of vagueness and overbreadth. Slip Op. at 16. That is a major reason why both the Sixth Circuit and the District

(Continued on following page)

the reasons discussed above, the Sixth Circuit correctly held that the District Court exceeded the scope of its powers by substantially rewriting the Ordinances.

C. The Definition of "Drug Paraphernalia" Clearly Is Vague and Overbroad and Invites Discriminatory Enforcement in Violation of the Due Process Clause of the Constitution.

The Sixth Circuit held that the definition of "drug paraphernalia" in the Ordinances is vague and overbroad in violation of the Fourteenth Amendment to the Constitution. That determination, based upon the application of principles enunciated by this Court, is clearly correct.

The Sixth Circuit set forth the standards of vagueness and overbreadth which guided its decision:

> The due process clause of the Fourteenth Amendment includes the doctrines of void-for-vagueness and overbreadth. These two doctrines have distinct meanings and purposes, though a statute which is vague is also often overbroad. The void-for-vagueness doctrine commands any statute to give persons of common intelligence fair notice of the persons covered and the conduct proscribed. *Colautti v. Franklin,* 439 U.S. 379, 390-91 (1979). Fundamental fairness, as well as a proper regard for preventing the deterrence of constitutionally protected conduct, requires that per-

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Footnote continued—

Court properly held that abstention is inappropriate in this case. Slip Op. at 15-17. Among the courts which have been presented with constitutional challenges to laws regulating "drug paraphernalia," only one abstained; its decision to abstain was reversed by the Court of Appeals for the Fifth Circuit. *High Ol' Times, Inc. v. Busbee,* 621 F.2d 135 (5th Cir. 1980). The Cities do not contest on appeal the holding of the District Court and the Sixth Circuit on the abstention issue.

sons not be compelled to guess at their own peril the meaning and application of a statute. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). Ascertainable standards of guilt are imperative in order to protect against arbitrary, erratic, and discriminatory arrests, prosecutions and convictions. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972); *Winters v. New York,* 333 U.S. 507, 515 (1948). Unless the statute itself prescribes sufficiently precise standards, basic policy decisions are impermissibly delegated to the personal predilections of the police, prosecutors and juries. *Smith v. Goguen,* 415 U.S. at 575 (1974); *Grayned v. City of Rockford,* 408 U.S. at 108. "Legislators may not so abdicate their responsibilities for setting the standards of the criminal law." 415 U.S. at 575. Finally, a greater degree of precision is required when the statute defines criminal offenses or impinges on activities protected by the First Amendment. *Hynes v. Mayor and Council of the Borough of Oradell,* 425 U.S. at 620; *Winters v. New York,* 333 U.S. at 515; *Diebold, Inc. v. Marshall,* 585 F.2d 1327, 1336 (6th Cir. 1978). *But see Rose v. Locke,* 423 U.S. 48, 50 (1975) (per curiam).

The overbreadth doctrine prohibits a statute from making innocent or constitutionally protected conduct criminal. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971). The statutory language may be very clear, yet "sweep unnecessarily broadly to invade the area of protected freedoms." *Sawyer v. Sandstrom,* 615 F.2d 311 (5th Cir. 1980). The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct.

Slip Op. at 19-20. The Cities do not challenge these standards.

The Ordinances define "drug paraphernalia," in pertinent part, as all items "designed for use" in drug-related activities. The Sixth Circuit correctly applied the foregoing due process standards in determining that the definition of "drug paraphernalia" is vague and overbroad.

The crucial problem in defining "drug paraphernalia" in terms of the "design" of items is the lack of any design characteristics that distinguish items with lawful uses and purposes from items with unlawful uses. Slip Op. at 26-27. The unrebutted evidence introduced in the District Court established that practically any everyday item can be and has been used in drug-related activities. "The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user." Slip Op. at 26.

The court in *Indiana Chapter, NORML, Inc. v. Sendak*, slip op. at 12-14, in a well-reasoned opinion relied upon by the Sixth Circuit,[28] held that a definition of "drug paraphernalia" relying upon design characteristics is unconstitutionally vague:

> The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand

28. Slip Op. at 24-26.

> mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the statute] what is included in the definition. The definition fails to make clear what items are included in the statutory provision and what items are not.

Due to the limitless range of items which may be used or adapted for use with controlled substances and the lack of any unique design characteristics differentiating drug-related devices from innocent items, the Ordinances fail to "give persons of common intelligence fair notice" of the "conduct proscribed," and therefore violate due process.[29] *Accord, The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates,* No. 80-1462 (7th Cir. Jan. 12, 1981); *Weiler v. Carpenter,* No. 80-637-JB, slip op. 11-12 (D.N.M. Feb. 11, 1981); *Lazy, J., Ltd. v. The Borough of State College,* No. 80-1167, slip op. 4-7 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville,* No. LR-C-80-314, slip op. 4-5 (E.D. Ark. Jan. 8, 1981); *Gaffey v. Babb,* No. CA-13882, slip op. 20-22 (Ct. App. Or. Feb. 23, 1981).

The District Court erroneously upheld the constitutionality of the phrase "designed for use" on the ground that there are unique, ascertainable design characteristics

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29. The Sixth Circuit recognized that the term "designed" is not limited to items *solely* designed to be "drug paraphernalia:"

> The comments to the Model Act indicate that the ordinances would apply to items which are not solely designed to be drug paraphernalia. App. 1237. Vagueness enters in our case once the ordinances begin to define drug paraphernalia in terms of the primary adaption or dominant purpose of the design. Then the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandestine society of drug users. *Geiger v. City of Egan,* 618 F.2d 26 (8th Cir. 1980); *Music Stop, Inc. v. City of Ferndale,* 488 F. Supp. 390 (E.D. Mich. 1980).

Slip Op. at 26.

inherent in "drug paraphernalia." 492 F. Supp. 1157, 1169 n.5. The District Court erred in basing its conclusion on evidence introduced in another case not before it, *Tobacco Road v. City of Novi,* 490 F. Supp. 537 (E.D. Mich. 1980),[30] while disregarding the unrebutted evidence in the record before it. Slip Op. at 26 n.20.

The lack of design characteristics of "drug paraphernalia" is what distinguishes the instant action from cases determined fifty years ago under the National Prohibition Act, relied upon by the Cities at pages 11-12 of their Jurisdictional Statement. The term "designed" under the National Prohibition Act was held to refer to "inherent qualities" of items "peculiarly designed" for the unlawful use proscribed in that Act. *See, e.g., United States v. Brunett,* 53 F.2d 219, 230 (W.D. Mo. 1931).[31]

In view of the lack of any inherent design characteristics differentiating lawful items from unlawful "drug paraphernalia," it is clear that the definition of "drug paraphernalia" fails to provide fair notice of proscribed items and invites discriminatory enforcement of the Ordinances. The testimony of the Cities' narcotics law enforcement experts introduced at trial and recounted by the Sixth Circuit con-

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30. A virtually identical ordinance to that upheld by the court in *Tobacco Road* subsequently was declared unconstitutional by a different judge of the same court in *Music Stop, Inc. v. City of Ferndale,* 488 F. Supp. 390 (E.D. Mich. 1980).

31. The court in *Brunett* stated:

> I think the words refer, not only to the design and intention of the vendor, but as well to the *inherent qualities* of the preparation, compound, and substance sold. The preparation, compound and substance *must* be within itself *peculiarly designed* for the unlawful use referred to in this section. Otherwise we might have criminal cases in which nothing more was sold than a box of matches or a gallon of gasoline. For certainly matches and gasoline are substances, and certainly, also, they not only may be used, but necessarily are used, in the unlawful manufacture of such intoxicating liquors as, for example, distilled spirits.

53 F.2d at 231 (emphasis added).

vincingly demonstrates the danger of arbitrary and discriminatory enforcement of the Ordinances:

> Detectives Bennett and Rutt would arrest any retailer who sold pipes with screens or chamber pipes, despite the ability to use these pipes lawfully. App. 712-13, 717-18, 850-51. Detective Rutt would arrest a retailer operating a "head shop" if it sold alligator clips or cigarette papers, but not a drug store owner selling the same items. App. 853, 864-65. This testimony suggests that the ordinances would be enforced only against "head shops", designated by the local law enforcement officials. No guidelines have been written to prevent such selective discriminatory enforcement. Because the ordinances would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance, the definition of drug paraphernalia is vague and overbroad.

Slip Op. at 27.[32]

For the reasons discussed above, it is clear that the Sixth Circuit correctly applied the standards of due process

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32. The Sixth Circuit suggested that the vagueness and overbreadth of the definition of "drug paraphernalia" may be due to the failure of the legislators in Parma and Lakewood to study or investigate the "drug paraphernalia" industry:

> Parma Mayor Petruska, Councilwoman Krawczyk and Councilman Labutta each testified at deposition to their total lack of familiarity with drug paraphernalia and their inability to define it. App. 928-29, 933, 969, 984, 1130, 1140. Time and again, they stated that the definition of drug paraphernalia was the responsibility of the police. App. 901-02, 930, 985, 1001, 1003. The record shows beyond peradventure the legislators' conscious delegation of basic policymaking decisions to the police, prosecutors, and juries. Due process forbids such delegation of legislative responsibility. *Smith v. Goguen*, 415 U.S. at 575; *Grayned v. City of Rockford*, 408 U.S. at 108.

Slip Op. at 28.

set forth by this Court in determining that the definition of "drug paraphernalia" in the Ordinances is vague and overbroad. "Drug paraphernalia" cannot validly be defined in terms of the unlawful "design" of certain items.

The Ordinances also define "drug paraphernalia" as all items "used" or "intended for use" in drug-related activities. These definitions of "drug paraphernalia" are also vague and overbroad in violation of the aforesaid principles of due process. *E.g., General Stores, Inc. v. City of Albuquerque*, No. 81-0027-M, slip op. at 4-5 (D.N.M. March 23, 1981); *Weiler v. Carpenter*, No. 80-637-JB, slip op. at 8-11 (D.N.M. Feb. 11, 1981); *Gaffey v. Babb*, No. CA-13882, slip op. at 14-17 (Ct. App. Or. Feb. 23, 1981); *The Town Tobacconist v. Degnan*, No. C-2198-80, slip op. at 8 (Super. Ct. Ch. N.J. March 12, 1981).[33]

Defining "drug paraphernalia" as items "used" or "intended for use" in drug-related activities violates due process by failing to give proper notice of illicit items and by permitting innocent persons to be arrested, prosecuted, and convicted on the basis of an act or state of mind of another person.[34] The constitutional defects in these definitions of "drug paraphernalia" are well-stated by the court in *Weiler v. Carpenter*, slip op. at 8-10 (emphasis in original):

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33. The Sixth Circuit upheld the constitutionality of the terms "used" and "intended for use." Slip Op. at 23.

34. The legislative history of the Ordinances clearly reveals that the phrases "used" and "intended for use" refer to the use or intended use by a purchaser or prospective user. Statement of Peter Bensinger, Drug Enforcement Administration, before House Select Committee on Narcotics Abuse and Control, November 1, 1979 at 4-5, App. at 1064-65; Deposition of Victor Labutta, Parma City Councilman, January 22, 1980, App. at 1123-24; Deposition of Doris Krawczyk, sponsor of the Parma Ordinance, January 22, 1980, App. at 994. The legislative history must be accorded "substantial weight" in interpreting the Ordinances. *Federal Energy Administration v. Algonquin, SNG, Inc.*, 426 U.S. 548 (1976).

> [A]n owner, or anyone in control of "drug paraphernalia," can be liable for failing to divine a *purchaser's* intent with regard to an item. Stated another way, the determinative element in defining "drug paraphernalia" is the intent of someone other than the person to be charged with the ordinance violation . . . . Consider the following hypothetical situation. A salesclerk, working in a large grocery store, sells plastic sandwich bags to dozens of customers daily. Plastic sandwich bags fall into the definition of "drug paraphernalia" if they meet the "intended for use" standard. It is probable, even likely, that one or more of those plastic sandwich bags is intended for illicit drug use by the purchaser. The Court cannot fathom how the clerk could determine which purchaser intended the bags for illicit use. . . . Not only must the clerk guess at each and every purchaser's intent; he must also run the risk that his determination of a purchaser's "innocent" intent may be different than a police determination. . . . The *police officer* determines, independent of any guideline, what constitutes a violation of the ordinance. The net cast by the . . . ordinance is "large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Papachristou v. City of Jacksonville, supra,* 405 U.S. at 165. An ordinance that does no more than unconstitutionally increase the arsenal of police simply cannot stand. *Id.*[35]

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35. The court in *The Town Tobacconist,* slip op. at 7-8, also clearly described the constitutional defects in the phrases "used" and "intended for use:"

> Objects are not used or intended for use in an unpopulated vacuum. The use or intention for use envisioned by the statute must be by someone. It is not facially clear

(Continued on following page)

For these reasons, the terms "used" and "intended for use", as well as "designed for use", are vague and overbroad and invite discriminatory enforcement in violation of the Fourteenth Amendment to the Constitution. Therefore, the definition of "drug paraphernalia" in the Ordinances cannot pass constitutional muster.

D. The Ordinances Create Permissive Inferences in Violation of Due Process Standards.

The Ordinances list items deemed to be "common forms of drug paraphernalia."[36] Slip Op. at 29; Jurisdictional Statement at 7. That listing impermissibly allows law enforcement officers, judges and juries to infer guilt from possession, sale or manufacture of an item listed therein. Said permissive inference violate due process.

A permissive inference:

> allows - but does not require - the trier of fact to infer the elemental fact [*i.e.*, sale or possession of "drug

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Footnote continued—

> whether "used" means frequently used or used by someone in particular against whom enforcement may be aimed and whether "intended for use" means intended by its manufacturer, its seller or its ultimate possessor for use. . . .
>
> It is not the seller's intent that is at issue. If it were, then an item would not be drug paraphernalia unless the retailer intended that his customer use it unlawfully. It is plain that the retailer's intent is to sell the item. . . .
>
> . . . .
>
> The phrase "used or intended for use", that appears a dozen times renders the definition of drug paraphernalia unlawfully vague. It is impossible for any retailer to know whose use of whose intention he must be aware of. If it is "frequent" use, he can not tell how frequent it must be, or among what groups of people. If it is the customer's intention, then, before the customer arrives, the retailer can not tell if he is unlawfully stocking drug paraphernalia. The prior act of putting the item on his shelves would become unlawful only later, after the intentions of the yet unidentified customer are revealed.

36. Parma Ordinance § 620.01(dd)(1)(L); Lakewood Ordinance § 513.01(cc)(1)(L).

> paraphernalia"] from proof by the prosecutor of the basic one [*i.e.*, sale or possession of an item listed in the Ordinances as a common item of "drug paraphernalia"] and that places no burden of any kind on the defendant.

County Court of Ulster County v. Allen, 442 U.S. 140, 157 (1979) (bracketed language added). *Accord, Hammontree v. Phelps*, 605 F.2d 1371, 1374-75 (5th Cir. 1979).

A permissive inference violates due process unless it can be said with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 442 U.S. at 165-66 & n.28. *See also Barnes v. United States*, 412 U.S. 837, 842, 843 (1973); *Leary v. United States*, 395 U.S. 6 (1969); *McInerney v. Berman*, 473 F. Supp. 187, 188 (D. Mass. 1979), *aff'd*, 621 F.2d 20 (1st Cir.), *cert. denied*, 101 S.Ct. 201, 66 L. Ed. 2d 85 (1980).

The inferences permitted under the Ordinances by listing common forms of "drug paraphernalia" violate due process.[37] As the evidence introduced at trial and discussed above clearly demonstrates, there are no unique design characteristics distinguishing lawful items from "drug paraphernalia." Items listed in the Ordinances include, for instance, "roach clips," which are defined as any objects which can be used to hold the short end of a burning marijuana cigarette, such as electricians' alligator clips or tweezers, and "miniature cocaine spoons," which include any small spoons, such as McDonald's coffee stirrers and salt cellars. Slip Op. at 30. Certainly it cannot be said

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37. As is evident from the language of the Ordinances, only those items listed in subparagraph (L) of Sections 620.01(dd)(1) and 513.01(cc)(1) raise permissive inferences. By equating items not listed in subparagraph (L) with items listed therein, the Cities apparently fail to understand the distinction between items listed in subparagraph (L) and other subparagraphs of Sections 620.01(dd)(1) and 513.01(cc)(1) of the Ordinances. Jurisdictional Statement at 16.

with substantial assurance that a vendor more likely than not is selling items which will be used in drug-related activities merely from proof of sales of small spoons and tweezers. As the Sixth Circuit correctly stated, "[B]ecause the objects have many lawful uses, and because the design characteristics do not distinguish objects intended for lawful use from objects intended for unlawful uses, the object by itself does not provide any basis for an inference of its intended use." Slip Op. at 31. Therefore, the permissive inferences created by listing in the Ordinances common forms of "drug paraphernalia" clearly violate due process. *See County Court of Ulster County.*

The Ordinances also list various factors which law enforcement officers, judges and juries are instructed to consider in determining the guilt of an individual.[38] Most of those factors permit the guilt of an accused to be inferred from circumstances outside the control of the accused. Therefore, those factors create permissive inferences in violation of due process standards. There is not a sufficient connection between proof of those factors and the guilt of the accused so as to satisfy requirements of due process. *E.g., General Stores, Inc. v. City of Albuquerque,* slip op. at 5-6, 7; *Weiler v. Carpenter,* slip op. at 12-13; *Lazy, J., Ltd. v. The Borough of State College,* slip op. at 8-9.

The constitutional defects present in the aforesaid listing of circumstantial factors were well described by the Sixth Circuit:

> A . . . flaw in the list of "logically relevant factors" is the potential arrest, prosecution, or conviction of a person on the impermissible theory of guilt by association. *See Templeton v. United States,* 151 F.2d 706 (6th Cir. 1945). The factors include the proximity in time and space to a direct violation of the drug laws or

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38. Parma Ordinance §§ 620.01(dd)(2)(A)-(N); Lakewood Ordinance §§ 513.01(cc)(2)(A)-(M), as amended.

> to the presence of controlled substances, the statements of others, and the advertising of others. Thus, a retailer, for example, to avoid arrest, prosecution, or conviction, must continuously police the national and local media and the activities and statements of persons in the area of his store. The retailer could be safe from arrest on Monday morning when no one congregated near his store or the local narcotics dealer was on the other side of town, yet be very susceptible to arrest Monday afternoon when, unknown to the retailer, the narcotics dealer arrived around the corner from his store, attracting a group of persons who bought marijuana or other controlled substances and then came into his retail store to buy rolling papers, alligator clips, or pipes. In short, the ordinances permit events beyond the control of the retail owner to determine his guilt. The danger is that the ordinances could be applied to make a crime out of constitutionally protected or innocent conduct because of the actions or statements by persons other than the defendant. It is well established that guilt must be based on personal action, statements, or knowledge, not on association with other persons suspected of criminal conduct. *Sawyer v. Sandstrom,* 615 F.2d 311, 316-17 (5th Cir. 1980).

Slip Op. at 31-32.[39] The Ordinances also permit, for example, guilt of a vendor to be inferred from proof that a high percentage of the vendor's sales are pipes or alligator

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39. The Cities assert that the Sixth Circuit, in considering the factors discussed above, dealt only with "hypothetical applications" and "marginal cases." Jurisdictional Statement at 16-17. However, the cases relied upon by the Cities do not support that position. *Id.* Indeed, it is difficult to conceive of constitutional applications of these circumstantial factors listed in the Ordinances.

clips[40] or from proof that the vendor had been convicted many years earlier of possession of marijuana.[41]

It cannot be said with substantial assurance that a vendor is selling items which will be used with controlled substances merely from proof of the various factors discussed above. Therefore, it is clear that the list of circumstantial factors in the Ordinances creates permissive inferences in violation of due process standards.

E. The Sixth Circuit Correctly Held that the Ordinances Impermissibly Penalize Speech Protected by the First Amendment to the Constitution.

The Ordinances prohibit advertising which promotes, in whole or in part, the use or sale of "drug paraphernalia." The Sixth Circuit correctly determined that the Ordinances violate protections guaranteed by the First Amendment,[42] applying the analysis set forth by this Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341, 351 (June 20, 1980):

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If

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40. Parma Ordinance § 620.01(dd)(2)(L); Lakewood Ordinance § 513.01(cc)(2)(k), as amended.

41. Parma Ordinance § 620.01(dd)(2)(B); Lakewood Ordinance § 513.01(cc)(2)(B).

42. The prohibition on advertising is also vague and overbroad for its use of the term "designed," as discussed above, and for its use of the criterion "reasonably should know." Slip Op. at 39 n.32. The Cities admit that the term "reasonably should know" is unconstitutional. Jurisdictional Statement at 6.

> both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

First, the Sixth Circuit properly determined that the advertising banned by the Ordinances does not concern only lawful activity:

> The ordinances forbid the use, sale, or manufacture of drug paraphernalia. Because the force of each ordinance stops at the city limits, the use, sale or manufacture of drug paraphernalia is unlawful only in Parma, Lakewood, and North Olmsted. Consequently, the ordinances may prohibit the placement of advertisements only within the city limits about "drug paraphernalia" available within the city limits. The ordinances, as now drafted, could infringe on protected speech in at least three different ways. First, the ordinances could be enforced against advertisers or publishers who place advertisements in printed media that circulates in other cities as well as Parma, Lakewood, and North Olmsted. Second, the ordinances could prevent the residents of these three cities from receiving information about the availability of items, defined by the ordinances as drug paraphernalia, in other cities that do not prohibit the use, sale or manufacture of those items. *Bigelow v. Virginia,* 421 U.S. 809, 824-25 (1975). Third, the ordinances use of the words "promote in part" may allow the ban of speech discussing the reform of drug laws or speech glorifying the drug culture. *See Amusement Devices Ass'n v. Ohio,* 443 F. Supp. at 1051 ("facilitate").

Slip Op. at 38-39.

Bigelow v. Virginia, 421 U.S. 809 (1975), involved circumstances very similar to those involved herein. The Court in *Bigelow* had before it a Virginia statute which prohibited dissemination of information encouraging or promoting abortions. An editor of the University of Virginia newspaper was convicted thereunder for printing an advertisement containing information about abortion services legally available in New York. This Court declared the Virginia statute unconstitutional and reversed the conviction, stating:

> The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that state. . . . Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the state conceded, . . . prosecute them for going there. . . . Virginia possessed no authority to regulate the services provided in New York . . . .

421 U.S. at 823-24. Contrary to the Cities' argument at page 10 of their Jurisdictional Statement, these cases do not present to the Court for review the question left open in footnote 14 in *Bigelow v. Virginia*, 421 U.S. 809, 828 n.14 (1975).[43] The ban of the Ordinances is as fatally broad as the Virginia statute, reaching advertisements promoting the sale of "drug paraphernalia" in communities other than

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43. This Court left open the following issue:

> We are not required to decide here what the First Amendment consequences would be if the Virginia advertisement promoted an activity in New York which was then illegal in New York. An example would be an advertisement announcing the availability of narcotics in New York City when the possession and sale of narcotics was proscribed in the State of New York.

421 U.S. at 828 n.14.

Parma and Lakewood, almost all of which legally permit the sale of items which Parma officials might consider to be "drug paraphernalia." The Sixth Circuit properly and precisely followed the lead of this Court and held that the Ordinances violated First Amendment protections.[44]

The Cities, in their Jurisdictional Statement, fail to address the holding of the Sixth Circuit that the Ordinances infringe on protected speech by flatly barring all advertisements which have as one purpose (of many potential purposes) the promotion of the sale of "drug paraphernalia." The Court's decision in *Bigelow* also clearly sustains this rationale underlying the Sixth Circuit's holding that the Ordinances penalize protected speech. The advertisement at issue in *Bigelow* had as its primary purpose the promotion of abortions, a commercial transaction. However, because the advertisement also contained "factual matter of clear 'public interest,' " the Court in *Bigelow* held that the statute unconstitutionally infringed protected speech.[45] *Accord, New York Times v. Sullivan,* 376 U.S. 254 (1964). Use of the words "promote in part" in the Ordinances certainly places a ban on speech containing "factual matters of public interest." Therefore, for this reason as well, the Sixth Circuit correctly found that the Ordinances penalize protected speech.

After determining that the Ordinances ban speech protected by the First Amendment, the Sixth Circuit then

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44. The Cities argue that the Sixth Circuit should have applied a "limiting construction" to the Ordinances. Jurisdictional Statement at 18. However, this Court, when faced in *Bigelow* with a statute, like the Ordinances, which failed to limit its curb on expression to its own geographical borders did not "rewrite" or "construe" that statute. For the reasons discussed in Part B, *supra*, the Sixth Circuit correctly refused the Cities' invitation to undertake judicial "legislation."

45. 421 U.S. at 822.

examined the remaining factors set forth by the Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York.* While the Sixth Circuit determined that the asserted regulatory interest of Parma and Lakewood in stopping drug abuse is substantial and that the Ordinances advance that interest, it properly held that the reach of the Ordinances is more extensive than necessary to serve that interest. The Sixth Circuit, therefore, correctly held the Ordinances violative of the First Amendment right of free speech.

CONCLUSION

The Ordinances violate the Ohio Constitution because they conflict with a statute recently enacted by the State of Ohio. Therefore, this appeal should be dismissed. In the alternative, the questions presented are so unsubstantial as not to warrant further argument; they have not been considered by any other United States Court of Appeals and the Ordinances materially differ from the Model Act. Moreover, the opinion of the Sixth Circuit is plainly correct. For these reasons, the judgment of the Sixth Circuit should be summarily affirmed.

Respectfully submitted,

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APPENDIX

Section 2925.14 of the Ohio Revised Code provides:

(A) As used in this section, "paraphernalia for the use of marihuana" means any instrument, device, article, or thing, whether or not of crude or extemporized manufacture or assembly, that is used or intended for use for any of the following:

(1) preparing marihuana for ingestion, inhalation, or other introduction into the human body;

(2) ingesting, inhaling, or otherwise introducing marihuana into the human body;

(3) enhancing the effect of marihuana upon the human body;

(4) testing the strength, effectiveness, or purity of marihuana.

(B) No person shall knowingly sell or offer to sell paraphernalia for the use of marihuana to any juvenile.

(C) The following are affirmative defenses to a charge under this section:

(1) The defendant is the parent, guardian, or custodian of the juvenile involved.

(2) The juvenile involved, at the time the paraphernalia for the use of marihuana was sold or offered for sale to him, was accompanied by his parent, guardian, or custodian who, with knowledge that the paraphernalia sold or offered for sale would be used or was intended for use

for a purpose set forth in division (A)(1), (2), (3), or (4) of this section, consented to the paraphernalia for the use of marihuana being sold or offered for sale to the juvenile.

(3) The juvenile involved exhibited to the defendant or his agent or employee a draft card, driver's license, birth certificate, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or older, and the person to whom the document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under eighteen years of age.

(D) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapter 3719., 4715., 4729., 4731., or 4741. of the Revised Code.

(E) Whoever violates this section is guilty of selling paraphernalia for the use of marihuana to juveniles, a misdemanor [*sic*] of the first degree.